

1987

Gail Kathleen Throckmorton v. Cecil Dee Throckmorton : Brief of Respondent

Utah Court of Appeals

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Nolan J. Olsen; Olsen & Olsen; Attorney for Respondent.

Robert M. McRae; McRae & DeLand; Attorneys for Appellant.

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UTAH COURT OF APPEALS
BRIEF

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DOCKET NO. 870400 CA

IN THE COURT OF APPEALS, STATE OF UTAH

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GAIL KATHLEEN THROCKMORTON,

Plaintiff/Respondent,

vs.

CECIL DEE THROCKMORTON,

Defendant/Appellant.

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Case No.: 870400-CA
Category: 14b

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CROSS-APPEAL AND REPLY BRIEF OF RESPONDENT

Appeal from the Order of the Third District Court
in and for Salt Lake County
The Honorable Homer F. Wilkinson

NOLAN J. OLSEN
OLSEN & OLSEN
8138 South State Street
Midvale, Utah 84047

Attorney for Plaintiff/
Respondent

ROBERT M. MCRAE
MCRAE & DELAND
209 East 100 North
Vernal, Utah 84078

Attorney for Defendant/
Appellant

FILED

JAN 15 1988

Timothy M. Sica
Clerk of the Court
Utah Court of Appeals

IN THE COURT OF APPEALS, STATE OF UTAH

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GAIL KATHLEEN THROCKMORTON,	:	
	:	
Plaintiff/Respondent,	:	
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Attorney for Plaintiff/
Respondent

ROBERT M. MCRAE
MCRAE & DELAND
209 East 100 North
Vernal, Utah 84078

Attorney for Defendant/
Appellant

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether it was reasonable and necessary that the trial court deny plaintiff any right, title and interest in and to one-half of plaintiff's retirement.

2. Whether the trial court was correct in denying plaintiff any right, title and interest in and to defendant's retirement when the Decree of Divorce was silent as to defendant's retirement.

3. Whether plaintiff's right in and to one-half of defendant's retirement was barred by res judicata.

4. Whether the plaintiff established a substantial change of circumstances which have occurred since the Decree of Divorce.

5. Whether the trial court's memorandum decision adequately supports the award of alimony to the plaintiff and after considering those factors, whether the court abused its discretion in awarding alimony to the plaintiff.

6. Whether the trial court correctly followed the purpose of alimony when alimony was awarded to the plaintiff and whether it was a clear and prejudicial abuse of discretion to award alimony to the plaintiff.

DETERMINATIVE RULE: Utah Code Annotated, Section 30-3-5

The rule relevant to this appeal is as follows:

"The court has continuing jurisdiction to make subsequent changes or new orders for the distribution of property as is reasonable and necessary."

IN THE COURT OF APPEALS, STATE OF UTAH

GAIL KATHLEEN THROCKMORTON,	:	
	:	
Plaintiff/Respondent,	:	
	:	
vs.	:	Case No.: 870400-CA
	:	Category: 14b
CECIL DEE THROCKMORTON,	:	
	:	
Defendant/Appellant.	:	

CROSS-APPEAL AND REPLY BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Plaintiff, Gail Kathleen Throckmorton, commenced an action seeking modification of a Decree of Divorce dated September 13, 1976. The plaintiff sought to have the alimony adjusted from the sum of \$1.00 per year to the sum of \$500.00 per month. The plaintiff further sought one-half of defendant's retirement, an asset of the marital estate which was not distributed pursuant to the Decree of Divorce dated September 13, 1976. The matter was heard in the Third Judicial District Court on the 16th day of July 1987, before the Honorable Homer F. Wilkinson. The court modified the Decree of Divorce specifically awarding the plaintiff the sum of \$396.00 per month. The court denied any type of award to the plaintiff of defendant's retirement account.

STATEMENT OF THE FACTS

Plaintiff and defendant were married on or about May 27, 1955. (Tr. at 5). During the twenty-one year marriage, plaintiff and defendant had eight (8) children, all of which have reached majority. (Tr. at 6). In August of 1976, a divorce complaint was filed and approximately one month later on September 13, 1976, the divorce was granted. (Tr. at 5). The divorce filed in

1976 was precipitated by the defendant who wanted the divorce. (Tr. at 5). The plaintiff went to defendant's attorney whom defendant paid and pursuant to the Decree of Divorce, plaintiff was awarded the care, custody and control of the eight (8) children of the marriage. (Tr. at 5). The plaintiff was further awarded, pursuant to the Decree of Divorce, the sum of \$1.00 per year as alimony. (Tr. at 6). The Decree of Divorce was silent as to defendant's retirement with the Utah State Retirement Fund. The defendant had commenced working as a police officer on November 17, 1958, and at the time the Decree of Divorce was granted, had approximately eighteen (18) years of service. (Tr. at 5). The defendant retired on August 31, 1984 with approximately twenty six (26) years of service. (Tr. at 5). The defendant presently receives the sum of \$1,580.00 per month and based on the actuarial tables, defendant will receive in excess of \$500,000.00 if defendant should live to the age set forth on the actuarial tables. (Tr. at 6). The plaintiff at the present time is unemployed, and has medical problems which include reactive absolute hyperglycemia, euthyroid, hypometabolism, chronic angina secondary to coronary insufficiency, and fibrocystic disease of the breast. (Tr. at 6). Plaintiff's doctor has recommended open heart surgery but due to plaintiff's financial condition, plaintiff has been unable to afford the operation. (Tr. at 6). The plaintiff in 1985 made the sum of \$500.00 which was used to help a son on a mission and support the other children which remained in the home. (Tr. at 6).

SUMMARY OF ARGUMENTS

The order of the Honorable Homer F. Wilkinson which modified the Decree of Divorce should be reversed as to denying plaintiff an interest in and

to defendant's retirement and upheld as to the alimony increase awarded to the plaintiff on the following basis.

1. The trial court having continuing jurisdiction to make subsequent changes to the Decree of Divorce as to the distribution of property should have granted to plaintiff one-half of defendant's retirement because it was reasonable and necessary.

2. The Decree of Divorce should have been modified by the trial court granting to plaintiff one-half of defendant's retirement when the Decree of Divorce was silent as to defendant's retirement.

3. The plaintiff's right to one-half of defendant's retirement should not have been barred by the Doctrine of Res Judicata when the issue of defendant's retirement had never been tried or determined in any previous adjudication.

4. The plaintiff established that there has been a substantial change in circumstances since the entry of the Decree of Divorce. The change in circumstances were as follows: (a) plaintiff has serious health problems including the need for open heart surgery; (b) the plaintiff is presently unemployed and due to her medical condition and is unable to work; (c) the children of the parties have all reached majority and defendant is no longer paying child support.

5. The trial court's memorandum decision adequately supports the award of alimony to the plaintiff. The award of alimony was based on the plaintiff being unemployed, being unable to obtain gainful employment because of medical problems, and the defendant having retirement income of \$18,970.00 per year or \$1,584.00 per month.

6. The trial court's award of alimony to the plaintiff was equitable and justified because it provided a means by which plaintiff can support herself and not become a ward of the state.

ARGUMENT

POINT I

THE TRIAL COURT HAVING CONTINUING JURISDICTION TO MAKE SUBSEQUENT CHANGES OR NEW ORDERS AS TO DISTRIBUTION OF PROPERTY SHOULD HAVE GRANTED TO PLAINTIFF ONE-HALF OF DEFENDANT'S RETIREMENT, THE SUBSEQUENT CHANGE BEING REASONABLE AND NECESSARY

Pursuant to U.C.A. Section 30-3-5 it states,

The court has continuing jurisdiction to make subsequent changes or new orders for the...distribution of property as is reasonable and necessary.

Applying the above statute to this case, it is clear the lower court had continuing jurisdiction to make new orders or changes as to the distribution of property as is reasonable and necessary. The Supreme Court of the State of Utah, in regard to the above statute, has stated,

"...Section 30-3-5 does authorize the divorce court to reallocate property rights between the parties to the divorce such as by modifying the earlier Decree." Sudquist v. Sudquist, 639 P.2d 181 (Utah 1982).

In Sudquist the Utah Supreme Court found that in a divorce proceeding, the District Court had continuing jurisdiction to make subsequent changes with respect to the distribution of the parties interest in "then owned" property. The plaintiff and defendant in the present case at the time of the divorce, jointly owned an interest in defendant's retirement. The

plaintiff, was unaware that she was entitled to one-half of defendant's retirement account at the time of the divorce or at the time of the modification of the Decree of Divorce in 1980. It was only after defendant retired and commenced receiving retirement that plaintiff became aware that she was entitled to one-half of defendant's retirement. The plaintiff should have been entitled to one-half of defendant's retirement as of the date of divorce in 1976 because the retirement had been accumulated during the marriage and was an asset of the marital estate. The District Court therefore having continuing jurisdiction to make subsequent changes or new orders, should have found it fair and reasonable that plaintiff be entitled to one-half of defendant's retirement as of the date of the divorce and the Decree should have been modified accordingly.

POINT II

THE DECREE OF DIVORCE SHOULD HAVE BEEN MODIFIED GRANTING TO PLAINTIFF ONE-HALF OF DEFENDANT'S RETIREMENT BECAUSE THE DECREE OF DIVORCE WAS SILENT AS TO THE RETIREMENT OF DEFENDANT

The Supreme Court has allowed for the modification of a divorce when the decree is silent in regard to an issue when the issue was not contemplated by the parties or the court at the time of the decree. See e.g. Thompson v. Thompson, 709 P.2d 360 (Utah, 1985). In Thompson the wife sought a modification of the Decree of Divorce where the decree was totally silent as to a loan. The Utah Supreme Court found that where a decree is silent, and a matter was not contemplated by the parties, and a substantial change of circumstances has occurred, a party to a divorce may petition the court by way

of a modification to have the matter considered and resolved by the court.

In the present case, the Decree of Divorce was totally silent as to the retirement of defendant and it was clearly not an issue that was contemplated by the parties or by the court. There has further been a substantial change of circumstances in that plaintiff has become medically unable to work and plaintiff only became aware of her right to defendant's retirement after working in the court system and being advised by a judge that she had the right to seek a portion of defendant's retirement. The decree being silent as to defendant's retirement and the retirement not being contemplated by the parties, and the substantial change of circumstance which have occurred should have required the court to grant to plaintiff one-half of defendant's retirement.

POINT III

PLAINTIFF'S RIGHT TO ONE-HALF OF DEFENDANT'S RETIREMENT SHOULD NOT HAVE BEEN BARRED BY THE DOCTRINE OF RES JUDICATA

The Supreme Court of Utah has stated the following,
When there has been an adjudication, it becomes res judicata as to those issues which were either tried and determined, or upon all issues which the party had a fair opportunity to present and have determined in the other proceeding. Jacobsen v. Jacobsen, 703 P.2d 303, 305 (Utah 1985).

As the above case states, an issue becomes res judicata when an issue is tried and determined or the parties had a fair opportunity to present the issue and have the issue determined. Applying this to the present case, plaintiff at no time had an opportunity to present the issue of defendant's retirement. Plaintiff's lack of knowledge or information as to her right to

one-half of defendant's retirement kept plaintiff from raising the issue at the time of the divorce and modification hearing. Plaintiff's right to one-half of defendant's retirement should not have been barred by the doctrine of res judicata when plaintiff did not have a previous opportunity to have the retirement issue determined.

POINT IV

THE TRIAL COURT CORRECTLY MODIFIED
THE DECREE OF DIVORCE AWARDING
ALIMONY TO THE DEFENDANT IN THAT A
SUBSTANTIAL CHANGE OF CIRCUMSTANCES
HAVE OCCURRED SINCE THE DECREE OF DIVORCE

The Utah Supreme Court has stated the following as to the modification of a Decree of Divorce,

A party who requests a modification of a divorce decree must initially show that a substantial change in the circumstances of at least one of the parties has occurred. E.g., Lord v. Shaw, Utah, 682 P.2d 853 (1984); Haslam v. Haslam, Utah, 657 P.2d 757 (1982); Christensen v. Christensen, supra. A relative change in the income and expenses of the parties, if comparatively significant, can amount to a substantial change in circumstances. Jeppson v. Jeppson, 684 P.2d 69 (Utah 1984).

Applying the above Utah cases, plaintiff has established a substantial change of circumstance since the entry of the Decree of Divorce. The substantial changes which have occurred are that plaintiff is suffering from serious medical problems including reactive absolute hyperglycemia, euthyroid, hypometabolism, chronic angina secondary to coronary insufficiency, and fibrocystic disease of the breast, with the recommendation of her doctor for open heart surgery. Due to plaintiff's medical problems, plaintiff is presently unemployed and unable to work. The fact that plaintiff was

unemployed at the time of divorce and is presently unemployed should not be the determining factor as to a change of circumstances. The fact which should be considered is that at the time of the divorce plaintiff was capable of working and at the present time plaintiff is incapable of working. Further, at the time of the divorce, defendant was paying child support to the plaintiff and at the present time all eight children have reached majority and plaintiff is no longer receiving any type of support from the defendant. The substantial changes which have occurred since the divorce all appear to be permanent changes. The condition of plaintiff's health is not likely to improve, and therefore, plaintiff will not be capable of working. All eight children have reached majority terminating completely any type of support from defendant to plaintiff with the exception of the alimony awarded to plaintiff by the District Court. The plaintiff having been married to defendant for approximately twenty one years and the change of circumstances which have occurred since the Decree of Divorce are a sufficient basis by which to uphold the trial court's award of alimony to the plaintiff.

POINT V

THE MEMORANDUM OF THE TRIAL COURT ADEQUATELY SUPPORTS THE AWARD OF ALIMONY TO THE PLAINTIFF

The Utah Supreme Court in regard to spousal support has stated,

In deciding whether or not to award spousal support and, if so, in what amount, the trial court must consider the financial condition and needs of the spouse claiming support, the ability of that spouse to provide sufficient income for him or herself, and the ability of the responding spouse to provide the support. Failure to consider these factors constitutes an abuse of discretion. Paffel v. Paffel, 732 P.2d 96 (Utah 1986).

Applying the above case to the court's memorandum decision, it is clear that the court took into consideration all items set forth in Paffel.

In paragraph 7 of its memorandum decision the court specifically dealt with the financial conditions and needs of the plaintiff and with the ability of the plaintiff to provide sufficient income for herself. The District Court found the plaintiff to be unemployed and unable to gain employment due to her physical condition. In paragraph 8 of its memorandum decision the District Court found defendant had the ability to provide support when it determined that defendant had yearly income of \$18,970.00 per year and \$1,584.00 per month. The trial court did not abuse its discretion in awarding alimony to the plaintiff when the court took into consideration plaintiff's needs, plaintiff's ability to support herself, and defendant's ability to provide the support to plaintiff.

POINT VI

THE TRIAL COURT'S AWARD OF ALIMONY TO THE PLAINTIFF WAS EQUITABLE AND JUSTIFIED CONSIDERING PLAINTIFF'S PHYSICAL AND FINANCIAL CONDITION

The Utah Appellate Court has stated the following as to the purpose of alimony.

The purpose of alimony is to "enable the receiving spouse to maintain as nearly as possible the standard of living enjoyed during the marriage and to prevent the spouse from becoming a public charge". Eames v. Eames, 735 P.2d 395, 397 (Utah App.1987)(citing Paffel v. Paffel, 732 P.2d 96, 100 (Utah 1986). This Court will not interfere with an award of alimony absent a showing of a clear and prejudicial abuse of discretion. Id. Talley v. Talley, 739 P. 2d 836 (Utah App. 1987).

As the above case states one of the purposes of alimony is that it

is a means by which to prevent a spouse from becoming a public charge. In the present case it is clear that the plaintiff will become a public charge unless defendant is required to provide support to the plaintiff.

As previously discussed plaintiff in 1985, earned approximately \$500.00 and due to plaintiff's medical condition, plaintiff is unemployed and unable to work. If the trial court would have awarded no alimony to the plaintiff when the plaintiff's circumstances are as outlined, it would have clearly been a prejudicial abuse of discretion. The court's award of alimony to the plaintiff should be upheld in that the purpose of alimony was followed by the District Court and the support awarded provides a means by which plaintiff can support herself rather than become a public charge.

CONCLUSION

The order of the District Court should be reversed as to denying plaintiff an interest in and to defendant's retirement because the Decree of Divorce was silent as to retirement, the issue had not previously been determined in any prior adjudication, and the award of one-half of defendant's retirement is reasonable and necessary. The order as to the award of alimony should be upheld because of the substantial change of circumstances which have occurred since the Decree of Divorce, the financial needs of the plaintiff, the financial ability of the defendant to provide the support for plaintiff, and the need to keep the plaintiff from becoming a public charge.

WHEREFORE, the Respondent respectfully requests this court to uphold the Order of the lower court wherein the alimony increase is awarded to the

plaintiff but reverse the Order of the lower court denying plaintiff an interest in and to defendant's retirement.

DATED this 15th day of January, 1988.

RESPECTFULLY SUBMITTED:

By: 

NOLAN J. OLSEN
Attorney for Respondent

CERTIFICATE OF MAILING

I hereby certify that on the 15 day of January,
1988, I mailed a true and correct copy of the foregoing CROSS-APPEAL AND REPLY
BRIEF OF RESPONDENT to: Robert M. Mcrae, Mcrae & Deland, attorneys for
defendant, 209 East 100 North, Vernal, Utah 84078, postage prepaid thereon.

A handwritten signature in cursive script, appearing to read "Robert M. Mcrae", written over a horizontal line.